89-1951

No. ———

Supreme Court, U.S.
FILED
JUN 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA TRAFFIC SERVICE, INC. and
ONEIDA MOTOR FREIGHT, INC.,
Petitioners,

v.

APPCO PAPER AND PLASTICS CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W., Suite 775
Washington, D.C. 20005
(202) 842-1741

KENNETH M. PIKEN
PIKEN & PIKEN, P.C.
95-25 Queens Blvd.
Rego Park, New York 11374-4565
(718) 275-1000
Attorneys for Petitioners

* Counsel of Record

Date: June 13, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED FOR REVIEW

Does a claim of unreasonable carrier practices based upon the existence of an unpublished rate agreement between a carrier and a shipper constitute a defense to an action at law to recover tariff charges pursuant to 49 U.S.C. Section 10761(a) and 11706(a)?

LIST OF PARTIES

Petitioner Delta Traffic Service, Inc. (hereinafter "Delta") is a Texas corporation engaged in freight bill auditing. Petitioner Oneida Motor Freight, Inc. (hereinafter "Oneida") is a bankrupt New York corporation previously engaged in for-hire motor carrier transportation in interstate commerce. Respondent Appco Paper and Plastics Corp. (hereinafter "Appco") is a New York corporation engaged in the purchase and sale of paper and plastics products.*

---

* There are no parent or subsidiary companies to be listed for the corporations named in this List of Parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTIONAL BASIS	1
STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	3
I. THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT	3
II. THIS COURT IS PRESENTLY CONSIDERING *MAISLIN INDUSTRIES* WHICH IS DISPOSITIVE OF THIS WRIT	9
CONCLUSION	9
APPENDIX A	1a
APPENDIX B	8a
APPENDIX C	10a
APPENDIX D	21a

TABLE OF AUTHORITIES

Cases: Page

Armour Packing Co. v. United States, 209 U.S. 56, 81 (1908) 8
Baldwin v. Scott County Milling Co., 307 U.S. 478, 484-85 (1939) 8
Louisville & N.R.R. v. Central Iron & Coal, 259 U.S. 59, 65 (1924) 8
Louisville & N.R.R. v. Maxwell, 237 U.S. 94, 97 (1915) 3, 7, 8
Louisville & N.R.R. v. Rice, 247 U.S. 201, 202 (1918) 8
Maislin Industries & U.S., Inc. v. Primary Steel, Inc., 879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S.Ct. 834 (1990) 9
Matter of Caravan Refrigerated Cargo, Inc., 864 F.2d 388 (5th Cir. 1989) 7
Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082, 1084 (5th Cir. 1974) 7
Montana-Dakota Utilities Co. v. Northwestern Public Service Co., 341 U.S. 246 (1951) 5
New Haven R. R. v. I.C.C., 200 U.S. 361, 391 (1906) 3
Regular Common Carrier Conference v. United States, 793 F.2d 376 (D.C. Cir. 1986) 5
Southern Pacific Transp. v. Commercial Metals Co., 456 U.S. 336 (1982) 8
Square D. Co. v. Niagara Frontier Tariff Bureau, 476 U.S. 409, 106 S.Ct. 1922 (1986) 8
Texas & P.R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 2d S.Ct. 350, 358 (1907) 6
Thurston Motor Lines v. Jordan K. Rand, 460 U.S. 533 (1983) 7, 8
T.I.M.E., Inc. v. United States, 359 U.S. 464 (1959) 4, 5, 6
United States v. Associated Transp. Co., 505 F.2d 366, 369 (D.C. Cir. 1974) 7

TABLE OF AUTHORITIES—Continued

	Page
Statutes:	
28 U.S.C. Sec. 1254(1)	2
49 U.S.C. Sec. 10701(a)	*passim*
49 U.S.C. Sec. 10704(b)(1)	6
49 U.S.C. Sec. 10704(b)(2)	6
49 U.S.C. Sec. 10761(a)	*passim*
49 U.S.C. Sec. 10761(b)	5
49 U.S.C. Sec. 11705(b)(3)	6, 7
49 U.S.C. Sec. 11706(a)	2
49 U.S.C. Sec. 11706(c)(2)	7
49 U.S.C. Sec. 11901	6
49 U.S.C. Sec. 11902	6
49 U.S.C. Sec. 11903	6
49 U.S.C. Sec. 11904	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. ———

DELTA TRAFFIC SERVICE, INC. and
ONEIDA MOTOR FREIGHT, INC.,
Petitioners,

v.

APPCO PAPER AND PLASTICS CORP.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 893 F.2d 472 and is reprinted at Appendix "A". The unreported order of the United States Court of Appeals for the Second Circuit denying Petitioner's Suggestion for Re-hearing is reprinted at Appendix "B".

The order and judgment of the United States District Court for the Eastern District of New York (Sifton, J.) granting summary judgment for Petitioners, and denying Respondent's Motion to Refer are reprinted at Appendix "C" and "D".

JURISDICTIONAL BASIS

The judgment of the United States Court of Appeals for the Second Circuit was dated, filed and entered on January 4, 1990. A suggestion for rehearing en banc was

denied on March 15, 1990. This court has jurisdiction pursuant to 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

49 U.S.C. Section 10701. Standards for Rates, Classifications, Through Routes, Rules, and Practices.

> (a) A rate (other than a rail rate), classification, rule, or practice related to transportation or service provided by a carrier subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title must be reasonable. . . .

49 U.S.C. Section 10761. Transportation prohibited without tariff.

> (a) Except as otherwise provided in this subtitle, a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under Chapter 105 of this title shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive a different compensation for that transportation or service than the rate specified in the tariff. . . .

STATEMENT OF THE CASE

Oneida was a motor common carrier operating pursuant to a certificate of public convenience and necessity issued by the Interstate Commerce Commission ("ICC"). Oneida operated under Title 49 of the United States Code which governs transportation in interstate commerce.

Pursuant to 49 U.S.C. Sections 10761(a) and 11706(a), Oneida and its audit company Delta undertook to recover freight charges from Appco by filing a civil action in the United States District Court for the Eastern District of New York. Upon consideration of Appco's Motion for referral and Oneida's and Delta's cross-motion for sum-

mary judgment, Judge Sifton granted judgment in favor of Oneida and Delta and against Appco. Judge Sifton's grant of summary judgment to Oneida and Delta was reversed by the U.S. Court of Appeals for the Second Circuit. On March 15, 1990, the Court of Appeals denied Oneida's and Delta's suggestion for rehearing en banc.

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW CONFLICTS WITH PRIOR DECISIONS OF THIS COURT

Under the regulatory scheme adopted by Congress and embodied in the Interstate Commerce Act, motor common carriers and shippers may not deviate from the filed tariff rate under any pretext. *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915). This rule of law is strictly applied because otherwise the Act's underlying purposes could be circumvented through judicially or administratively created exceptions favoring the interests of individual shippers and their secret rate deals. As this court held on the eve of the new Act to Regulate Commerce of 1887:

> It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to seek equality of rates as to all and to destroy favoritism, the last being accomplished by requiring the publication of tariffs and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.

New Haven R. R. v. I.C.C., 200 U.S. 361, 391 (1906). By reversing the District Court, the Court of Appeals below held that illegal, unpublished rates can be given legal effect as long as the ICC determines the collection of the filed rate to be an "unreasonable practice" The Court of Appeals improperly found that the ICC's jurisdiction over carrier practices set forth in section 10701 (a) empowers the Commission to declare the requirements of section 10761(a) unreasonable. However, section

10701(a) is only a general policy section that grants the Commission no remedial power at all. *T.I.M.E., Inc. v. United States*, 359 U.S. 464, (1959). Moreover and fundamentally, the practice being referred to the Commission is the collection of lawful tariff charges. This alleged "carrier practice" is actually a statutorily mandated requirement. *See* 49 U.S.C. Section 10761(a). As recognized by the District Court, below this strict rule of law derives from the statute itself and Supreme Court construction thereof, and neither the Commission nor the courts have authority to alter it.

The question of law presented is not whether it is unreasonable to quote and charge below-tariff rates, nor whether the ICC has jurisdiction over carrier "practices". The question is whether a voluntary, mistaken, or intentional deviation from a tariff rate nullifies the requirements of 49 U.S.C. Section 10761(a) so as to defeat a motor common carrier's right and duty to collect its lawful tariff charges. Neither the ICC nor the courts, acting either individually or in concert with one another, have the authority to waive the requirements of section 10761 (a) on the basis of secret agreements that result in departure from lawful tariff rates.

The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate could exist by allowing referral to the ICC. 893 F.2d at 475. (Appendix A at 6a). Thus, the question presented is the correctness of the court of Appeal's resolution of a legal issue, namely whether or not the ICC may allow assertion of an equitable defense under the guise of an "unreasonable practice" in an action at law to collect tariff charges. However, the Act provides that the courts have exclusive jurisdiction over actions to recover motor carrier tariff charges. 49 U.S.C. Section 11706(a). As discussed above, courts cannot allow equitable defenses by giving legal effect to rate agreements prohibited by statute. By the same token, the ICC has no authority to order the waiver of motor carrier undercharges, as the Com-

mission itself concedes. Nor does it have the authority to waive the tariff filing and adherence requirements of section 10761(a). *Regular Common Carrier Conference v. United States*, 793 F.2d 376, 379 (D.C. Cir. 1986). Notwithstanding these statutory prohibitions, the Court of Appeals found that the ICC may, upon referral from a court, circumvent the filed rate doctrine. However, a court and an agency cannot act in concert through the referral process to accomplish indirectly that which neither can do directly. *Cf. Montana-Dakota Util. Co. v. Northwestern Pub. S. Co.*, 341 U.S. 246, 254 (1951). Nevertheless, the Court of Appeals contends that the ICC, through its self-proclaimed jurisdiction over carrier practices under 49 U.S.C. Section 10701(a), can determine that the requirements of Section 10761(a) are unreasonable and should be waived. In effect, the court found that the Act may be used to defeat itself. This is not the law. The "practice" condemned by the Commission is the statutory requirement of adherence to lawful tariff charges. If Congress desired to give the Commission authority to relieve motor common carriers from the requirements of Section 10761(a), it could have done so, just as it did with respect to motor contract carriers. See 49 U.S.C. Section 10761(b) (authorizing the Commission to relieve contract carriers from the requirements of Section 10761 (a)). In light of the comprehensive review of this area of the law by Congress in 1980, it cannot be seriously argued that the Commission has been granted power by Section 10701(a) to relieve common carriers of the requirement to strictly adhere to filed tariffs.

Part II of the Act, originally enacted as the Motor Carrier Act of 1935, did not empower the Commission or the courts to determine reasonableness of rates on past shipments or afford shippers a cause of action or defense for past violations of the Act by a carrier. *T.I.M.E., Inc., supra*, at 469. Ultimately, a compromise was struck in the 89th Congress which created for the first time a justiciable legal right to reparations against motor carriers based

upon their duty to establish and maintain just, reasonable and non-discriminatory rates; however, it denied the Commission power to compel reparations and instead vested such power in the courts. *Compare* 49 U.S.C. Section 10704(b)(1) with Section 10704(b)(2).

The sole remedy of a shipper with respect to rates on past shipments is to commence a civil action against a carrier for reparations. Thus the Act affords shippers a remedy for "damages resulting from the imposition of rates for transportation or service the Commission . . . finds in violation of the Act". 49 U.S.C. Section 11705 (b)(3). Therefore the involvement of the Commission is purely ancillary to an action at law for reparations, namely to determine whether the filed tariff rates were unjust, unreasonable, discriminatory, prejudicial or preferential. Even after the Commission makes such determination, it is the exclusive prerogative of the court whether or not to follow the Commission's findings. Thus the Act, after revision in light of *T.I.M.E., Inc.*, makes clear that the shippers and carriers must look only to the filed tariff to determine the rights of the parties unless the tariff or rates contained therein are found to be unreasonable.

As noted by the Second Circuit, Appco did not claim that Oneida's filed rates were unreasonable. Rather, Appco based its defense on a claim that the collection of the filed rate "would constitute an unreasonable practice in light of the negotiated rate." 893 F.2d at 473. (Appendix A at 3a-4a).

The proposition that the Act permits either the Commission or a court, or both, to ratify illegal rate agreements turns the statute on its head. If true, then the ICC would have the power, through the courts, to use section 10701(a) to nullify the requirements, prohibitions, and civil and criminal sanctions provided by sections 10761(a), 11901, 11902, 11903, 11904 of the Act. Explaining the statutory scheme with respect to the filed rate doctrine, this Court has warned that "the Act cannot be held to destroy itself." *Texas & P.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 27 S.Ct. 350, 358 (1907).

Sections 10761(a) and 10701(a) of the Act are not mutually exclusive. Rather, they constitute the regulatory scheme Congress believed necessary to ensure that all shippers utilizing motor common carriers pay the full tariff charge. The ICC's "remedy", on the other hand, undermines the statutory scheme by condoning special rate agreements permitting individual shippers—such as Spector—to retain the benefit of a secret rate agreement. Validation of such agreements results in discrimination against those shippers who abide by the law by paying the filed tariff rate.

The rigid requirements of the filed rate doctrine reflect the will of Congress and only that body may change the statutory mandate. *Thurston Motor Lines v. Jordan K. Rand*, 468 U.S. 533 (1983). The exceptions Congress has permitted are narrow and carefully delineated. For example, the reparations remedy provided in 49 U.S.C. Sections 11705(b)(3) and 11706(c)(2) permits challenges to the lawfulness of tariff rates on past shipments. Even then, the shipper must pay the tariff rate before it can be challenged as unreasonable. It is the sole and exclusive remedy for excessive charges on past motor carrier shipments. *Matter of Caravan Refrigerated Cargo, Inc.*, 864 F.2d 388 (5th Cir. 1989). *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082, 1084 (5th Cir. 1974), and *United States v. Associated Transp.*, 505 F.2d 366, 369 (D.C. Cir. 1974).

The court below ignored over eighty years of Supreme Court precedent on this question of law. This Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all lawful charges set forth in the applicable tariffs. In *Louisville & N.R.R. v. Maxwell*, 237 U.S. 94, 97 (1915) (emphasis supplied) the Court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. *Deviation from it is not permitted upon any pretext.*

In *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908), the Court explained the rationale for the rigid rule of the filed rate doctrine:

> If the rates (filed and published as required by law are subject to secret alternation by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart.

This Court has invariably applied this rule of law when it has addressed the issue of adherence to lawful common carrier rates. See, e.g., *Thurston Motor Lines v. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983) (carrier's claim is predicated on the tariff, not an understanding with the shipper); *Southern Pacific Transportation v. Commercial Metals Co.*, 456 U.S. 336, (1982) (equitable defense of carrier's violation of ICC credit regulations rejected); *Baldwin v. Scott County Milling Co.*, 307 U.S. 478, 484-85 (1939); *Louisville & N.R.R. v. Central Iron & Coal*, 265 U.S. 59, 65 (1924) (no contract of carrier can reduce the amount legally payable for transportation of freight in interstate commerce); and *Louisville & N.R.R. v. Rice*, 247 U.S. 201, 202 (1918).

In *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409 (1986), this Court reaffirmed the continuing validity of the filed rate doctrine and its attendant prohibition against any departures from the tariff rate citing, among other cases, *Maxwell*. 476 U.S. at 416-417. Although *Square D* involved an antitrust challenge to filed rates, attempts to distinguish it fail in view of this Court's specific language stating that the filed tariff defines the rights of the shipper and carrier and cannot be varied by tort or contract. 476 U.S. 416-417. Since the decision of the United States Court of Appeals below conflicts with prior decisions of the U.S. Supreme Court as well as other U.S. Circuit Courts of Appeals, a writ of certiorari should issue.

II. THIS COURT IS PRESENTLY CONSIDERING *MAISLIN INDUSTRIES* WHICH IS DISPOSITIVE OF THIS WRIT

The issue raised in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 879 F.2d 400 (8th Cir. 1989), *cert. granted*, 110 S.Ct. 834 (1990), should be dispositive of the issue presented in this writ.

CONCLUSION

The decision below subverts a Congressionally fashioned regulatory scheme by allowing motor common carriers and their customers to freely negotiate prices without complying with the requirements of Section 10761(a). Congress has neither eliminated nor altered the strict tariff adherence requirements of the Act for motor common carriers; and until it does, equitable defenses are statutorily barred in actions at law such as the present proceedings.

The Petition of Delta and Oneida should be granted therefore to resolve the conflicting treatment of the filed rate doctrine among the U.S. Courts of Appeals, the U.S. District Courts and the U.S. Bankruptcy Courts. Accordingly, Petitioners pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

JOSEPH L. STEINFELD, JR.*
ROBERT B. WALKER
JOHN T. SIEGLER
SIMS, WALKER & STEINFELD, P.C.
1275 K Street, N.W., Suite 775
Washington, D.C. 20005
(202) 842-1741

KENNETH M. PIKEN
PIKEN & PIKEN, P.C.
95-25 Queens Blvd.
Rego Park, New York 11374-4565
(718) 275-1000
Attorneys for Petitioners

Date: June 13, 1990

* Counsel of Record

APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 1268 August Term, 1988

(Argued: August 17, 1989 Decided: January 4, 1990)

Docket No. 88-9057

DELTA TRAFFIC SERVICE, INC., and
ONEIDA MOTOR FREIGHT, INC.,
Plaintiffs-Appellees,

-v.-

APPCO PAPER & PLASTICS CORPORATION,
Defendant-Appellant.

BEFORE: MINER and ALTIMARI, *Circuit Judges*, and GRAY, *District Judge.**

Appeal from a judgment of the United States District Court for the Eastern District of New York (Sifton, *Judge*) which denied defendant's motion to stay the proceedings and refer the case to the Interstate Commerce Commission, and granted plaintiffs' cross-motion for summary judgment in an action to recover undercharges

---

* Honorable William P. Gray, Senior District Judge of the United States District Court for the Central District of California, sitting by designation.

to the tariffs filed with the Interstate Commerce Commission.

Reversed and remanded.

JOSEPH L. STEINFELD, JR., Washington, D.C. (Robert B. Walker, John T. Siegler, Sims, Walker & Steinfeld, P.C., Washington, D.C., Kenneth M. Piken, Piken & Piken, P.C., Rego Park, N.Y., of counsel), *for plaintiffs-appellees.*

WILLIAM J. AUGELLO, Huntington, N.Y. (Augello, Pezold & Hirschmann, P.C., Huntington, N.Y., of counsel), *for defendant-appellant.*

ALTIMARI, *Circuit Judge*:

In this case, we consider the "filed rate doctrine," which requires a motor carrier to collect the rate published in a tariff filed with the Interstate Commerce Commission ("ICC"), and we examine the court's role in an action to collect undercharges to the filed rate. Defendant-appellant Appco Paper and Plastics Corporation ("Appco") appeals from a judgment of the United States District Court for the Eastern District of New York (Sifton, *Judge*) which denied its motion to stay the court proceedings and refer the matter to the ICC, and granted plaintiffs-appellees Delta Traffic Service, Inc. ("Delta") and Oneida Motor Freight, Inc.'s ("Oneida") cross-motion for summary judgment under Fed. R. Civ. 56. Plaintiffs sought to recover the difference between the rate Oneida negotiated with, charged to, and collected from Appco for 420 shipments moved in interstate commerce by Oneida and the rate filed with the ICC. Appco argued, *inter alia*, that under the circumstances, collection of undercharges would constitute

an unreasonable practice, and that the ICC has primary jurisdiction over the issue of the reasonableness of carrier rates and practices. The district court determined that referrel to the ICC was precluded by longstanding precedent holding that courts may not consider equitable defenses to actions seeking collection of undercharges. Judgment was entered against Appco in the total amount of $26,597.27, including prejudgment interest. Since we find that Appco was entitled to a determination by the ICC as to the reasonableness of plaintiffs' practices, we reverse and remand for further proceedings.

BACKGROUND

In an effort to solicit shipping business, Oneida entered into negotiations over its transportation rates with Appco. Ultimately, Oneida agreed that it would charge Appco a discounted rate for the transportation of its products. Oneida represented to Appco that the rate negotiated between them would be published in a tariff filed with the ICC. Between January 1983 and July 1985, Oneida made 420 shipments of paper goods for Appco. Oneida billed Appco for these shipments at the negotiated rate and Appco paid each invoice in full.

Subsequently, pursuant to a freight audit contract approved by the United States Bankruptcy Court for the District of New Jersey, Delta audited Oneida's freight bills. Delta determined that the rates paid by Appco for Oneida's transportation services were less than the rates Oneida filed with the ICC. As a result, Delta created additional invoices in the total amount of $19,322.42. Thereafter, plaintiffs initiated the present action to recover the undercharges and interest.

In its answer, Appco raised estoppel, waiver, and other affirmative defenses grounded in the equitable maxim that a party ought not to profit from his own wrongdoing. In addition, Appco asserted that "the collection of undercharges based on the rate contained in the filed

tariff would constitute an unreasonable practice in light of the negotiated rate." Thereafter, Appco moved for a stay of proceedings and referral of the matter to the ICC for a determination as to whether collection of undercharges would be an unreasonable practice.

The district court found that the long line of authority which precludes equitable defenses to undercharge claims, *see, e.g., Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *Nyad Motor Freight, Inc. v. W.T. Grant Co.*, 486 F.2d 1112, 1114 (2d Cir. 1973), also precluded referral of this matter to the ICC. Accordingly, the district court denied Appco's motion, and granted summary judgment in favor of plaintiffs.

DISCUSSION

Appco contends that issues concerning the reasonableness of Oneida's practices fall within the primary jurisdiction of the ICC and that the filed rate doctrine does not preclude referral to the ICC for resolution of those issues. We agree.

The doctrine of primary jurisdiction applies when enforcement of a claim originally cognizable in the courts "requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64 (1956). Issues which involve the evaluation of the economics of a regulated industry, *see Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976), consideration of factual disputes uniquely within the specialized knowledge of an agency, *see Western Pacific R.R.*, 352 U.S. at 64, or which require uniformity in the regulation of business entrusted to a particular agency, *see Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952), properly fall within the primary jurisdiction of an agency. When a court is faced with such an issue, it must suspend judicial process pending referral of that issue to the proper administrative

body. *See Western Pacific R.R.*, 352 U.S. at 64; *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940).

The Interstate Commerce Act ("ICA") provides that "[a] rate . . . , classification, rule, or *practice* related to transportation or service provided by a carrier . . . *must be reasonable.*" 49 U.S.C. § 10701(a) (1982) (emphasis added). The Supreme Court long ago declared that "[w]henever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission." *Great Northern Ry. Co. v. Merchants Elevator Co.*, 259 U.S. 285, 291 (1922). A dispute concerning whether particular collection practices are reasonable "raises issues of transportation policy which ought to be considered by the Commission in the interests of a uniform and expert administration of the regulatory scheme laid down by [the ICA]," *Western Pacific R.R.*, 352 U.S. at 65, and thus falls within the ICC's primary jurisdiction. *See INF, Ltd. v. Spectro Alloys Corp.*, 881 F.2d 546, 548 (8th Cir. 1989); *Maislin Indus. v. Primary Steel, Inc.*, 879 F.2d 400, 403 (8th Cir. 1989); *Seaboard Sys. R.R., Inc. v. United States*, 794 F.2d 635, 637-38 (11th Cir. 1986); *cf. Carriers Traffic Serv., Inc. v. Anderson, Clayton & Co.*, 881 F.2d 475, 481 (7th Cir. 1989). *But see Supreme Beef Processors, Inc. v. Yaquinto*, 864 F.2d 388, 389-90 (5th Cir. 1989).

The district court found that it could not refer the instant dispute to the ICC because it was precluded from doing so by the filed rate doctrine's exclusion of equitable defenses. Section 10761(a) of the ICA states that

> a carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission . . . shall provide that transportation or service only if the rate for the transportation or service is contained in a tariff that is in effect under this subchapter. That carrier may not charge or receive

> a different compensation for that transportation or service than the rate specified in the tariff . . . .

It is well settled that courts are barred from considering equitable defenses to an action to collect undercharges from the filed rate. *E.g., Maxwell*, 237 U.S. at 97; *Siegel v. Converters Transp., Inc.*, 714 F.2d 213, 215 (2d Cir. 1983); *Nyad Motor Freight*, 486 F.2d at 1114. Contrary to the reasoning of the district court, however, this does not end the matter before us.

In *Maxwell*, the landmark case often relied upon to support strict application of the filed rate doctrine, the Supreme Court explained that:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it and they as well as the carrier must abide by it, *unless it is found by the Commission to be unreasonable.*

237 U.S. at 97 (emphasis added). Although courts may not mitigate the filed rate by resort to equitable defenses, *Maxwell* recognized an exception to strict enforcement of the filed rate when adverse findings concerning the reasonableness of a disputed rate have been made by the ICC. *See id.* Since this exception contemplates some action by the ICC, we do not view the filed rate doctrine as a roadblock preventing referral of undercharge actions to the ICC. We find that the district court improperly denied Appco's motion for a stay and referral of proceedings to the ICC. *See Maislin Inds.*, 879 F.2d at 405 ("[T]he district court is required to enforce the tariff provisions of section 10761(a), unless the ICC, *upon referral by the district court*, determines that a carrier's billing practices were unreasonable and that to enforce the tariff requirement would be unlawful.") (emphasis added).

Recently, the Fifth Circuit declined to refer an issue of the reasonableness of a carrier's collection practice to

the ICC because it was "unwilling to permit [the shipper's] unreasonableness defense to undermine the filed tariff doctrine." *Supreme Beef*, 864 F.2d at 391. We do not agree that referral to the ICC undermines the filed rate doctrine. As previously discussed, *Maxwell* indicated that a filed rate should not be enforced if the ICC found it to be unreasonable. Once the ICC finds a rate or practice to be reasonable, however, courts must comply with the filed rate doctrine and may not consider equitable defenses to an action to collect undercharges. For instance, should the ICC upon referral find plaintiffs' collection practices to be reasonable, the district court could not subsequently hold plaintiffs to be estopped from collecting the filed rate because Appco detrimentally relied on a misquoted rate. The courts remain fully bound by the filed rate doctrine.

CONCLUSION

In view of our determination that this matter be referred to the ICC, we do not reach Appco's arguments concerning the imposition of prejudgment interest. The judgment of the district court is reversed, and the case is remanded to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Number 88-9057

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fifteenth day of March one thousand nine hundred and ninety.

DELTA TRAFFIC SERVICE, INC. and
ONEIDA MOTOR FREIGHT, INC.,
Plaintiffs-Appellees,

v.

APPCO PAPER AND PLASTICS CORP.,
Defendant-Appellant.

[Filed Mar. 15, 1990]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs/appellees Delta Traffic Service, Inc. and Oneida Motor Freight, Inc. Upon consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court

in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ Elaine B. Goldsmith
ELAINE B. GOLDSMITH
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV-87-2325

DELTA TRAFFIC SERVICE, INC. *et ano*,
Plaintiffs,

against

APPCO PAPER & PLASTICS CORP.,
Defendant.

MEMORANDUM AND ORDER

SIFTON, District Judge

Plaintiffs, Delta Traffic Service, Inc. ("Delta") and Oneida Motor Freight, Inc. ("Oneida"), commenced this action against defendant, Appco Paper & Plastics Corp. ("Appco"), to recover $19,322.42 in alleged underpayments of freight charges pursuant to Oneida's interstate motor common carrier tariffs filed with the Interstate Commerce Commission ("ICC"). Plaintiffs claim that they are entitled in addition to costs in the amount of $120 and prejudgment interest in the amount of $5,874.41. They also claim entitlement to a per diem interest of $4.76. Therefore, they claim a total amount due as of September 29, 1988, of $26,597.27.

Jurisdiction is founded upon 28 U.S.C. § 1337 (Acts of Congress regulating interstate commerce) and 49 U.S.C. §§ 10741(a), 10761 and 10762, the Interstate Commerce Act. The matter is presently before the Court on defendant's motion for an order referring the facts of this matter to the Interstate Commerce Commission for an

advisory opinion and on plaintiffs' cross-motion for summary judgment.

The following facts are derived from plaintiffs' complaint and defendant's affidavits in support of its motion. The facts are undisputed except where indicated. Defendant is a New York corporation which entered into an agreement with plaintiff Oneida for the transportation of its goods in interstate and/or intrastate commerce. Plaintiff Delta is a freight audit company which audited Oneida's freight bills to determine whether they had been paid and properly rated according to the traffic filed by Oneida with the ICC and various state regulatory agencies. According to the complaint, the result of Delta's audit of the shipments handled by Oneida for defendant was a creation of additional invoices in the total amount of $19,322.42. Plaintiffs allege that this sum represents an undercharge, as defendant's payments did not equal the applicable ICC "filed tariff" rates.

Defendant claims in its answer and the affidavits filed in support of its motion that Oneida had agreed to disdiscount rates on shipment and that those discounts were the reason for the alleged underpayment. Defendant's answer contains an affirmative defense claiming that plaintiffs' claim is barred by the statute of limitations but does not press the contention in its motion papers.

Both of the instant motions were made in January 1988, at which time the Court told the parties that the motions were premature as the matter had not yet proceeded to arbitration. Since that time, the matter has been to arbitration, and the plaintiffs have demanded a trial *de novo*. The parties have now renewed their motions.

Defendant argues that this matter should be referred to the ICC because the ICC is the proper and primary forum which should address the tariff issues and the issue as to the reasonableness of plaintiffs' practices. The ICC, de-

fendant maintains, is the agency with the expertise and authority to resolve the dispute. According to defendant, the parties had negotiated discounts for the transportation of paper products from New York to defendant's customers. Furthermore, defendant states that in each case the negotiated rate was reached with the understanding that the negotiated rate would become the tariff rate by virtue of a filing by plaintiff Oneida. Appco's affidavits state that, despite Oneida's representations, it failed to submit the discounted rates to the ICC.

Plaintiffs contend that the case is not in need of the special expertise of the ICC, as the law is clear regarding a common carrier's legal duty to charge and a shipper's legal duty to pay the filed rates under 49 U.S.C. § 10761 (a). Plainitffs assert that there is no factual dispute as the defendant does not dispute that the higher charges now assessed by the plaintiffs are charges due under the filed rates. Thus, they say that the only dispute is whether as a matter of law, the defendant has any equitable defenses which would excuse it fram paying the "filed rate". Plaintiffs further contend that the 1986 ICC policy statement upon which the defendant relies is not binding on this Court and does not alter the statute's effects.

DISCUSSION

The United States Supreme Court has consistently held that carriers subject to the Interstate Commerce Act must collect, and shippers must pay, all charges set forth in the applicable tariffs.

> "Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the

> rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination."

See Thurston Motor Lines v. Jordan K. Rand Ltd., 460 U.S. 533, 634-35 (1983); *Southern Pacific Transportation Co. v. Commercial Metals Co.*, 456 U.S. 336, 343-44 (1982). The Courts of Appeals have continued to follow this "filed rate" doctrine and continued to apply strict construction to prevent the Commission's waiver of tariff requirements. *R.C.C.C. v. United States*, 793 F.2d 376 (D.C. Cir. 1986); *Inman Freight Systems, Inc. v. Olin Corp.*, 807 F.2d 117 (8th Cir. 1986); *Nyad Motor Freight Inc. v. W.T. Grand Co.*, 486 F.2d 1112, 1114 (2d Cir. 1973). Moreover, it is clear that the doctrine is so absolute that even a claim for relief founded upon a carrier's fraudulent practices or intentional misquotations will not be entertained. *Consolidated Freightways Corp. v. Terry Tuck, Inc.*, 612 F.2d 465 (9th Cir.), *cert. denied*, 447 U.S. 907 (1980); *Paulson v. Greyhound Lines, Inc.*, (8th Cir. 1986).

The above remains the applicable law. This is true in spite of recent indications the Commission has reconsidered the equitable consequences of this doctrine and made statements suggesting a new analysis. In October of 1986, the Commission reconsidered the issue of the availability of equitable defenses and the role of the ICC in evaluating the reasonableness of claimed deficiencies based on tariff rates. The ICC then adopted a policy statement which was summarized in the Federal Register as follows:

> "Where an undercharge claim is filed by a carrier in court based on a tariff rate and the shipper claims that a lower, negotiated but unpublished rate was understood, if the court refers the case to the Commission for determination of the availability of equitable relief, the Commission will decide whether,

> under all the relevant circumstances, collection of the undercharges would be an unreasonable practice."

ICC *Ex Parte* No. MC-177, slip op. (Oct. 29, 1986). The ICC pointed to a changed legal and regulatory "climate" to justify its changed position:

> "Today's regulatory environment makes is appropriate for us to take a fresh look at the proper regulatory response to the matter of unfiled negotiated motor carrier rates. The principle that the charges contained in an applicable tariff must be assessed regardless of any agreement between shipper and carrier arose during an era of strict entry and rate regulation. Requiring strict adherence to the tariff rate was intended to avoid intentional carrier misquotation of rates as a means to offer secret discounts to particular shippers. *See Western Transp. Co. v. Wilson*, 682 F.2d 1227, 1230 (7th Cir. 1982). In the strict regulatory environment prior to the Motor Carrier Act of 1980, Pub. L. No. 96-296 (MCA), carriers did not enjoy the flexibility they now enjoy to negotiate particularized rate arrangements with shippers. Consequently, they charged essentially the same rates for freight in a given traffic lane, and it generally was not difficult to ascertain the published rate. In that regulatory climate shippers rarely were excused from paying the published rate."

ICC *Ex Parte* No. MC-177, slip op. (Oct. 14, 1986).

Defendant notes that a few federal court decisions have taken note of the ICC policy statement and found it to be within the statutory scheme. *Seaboard System Railroad Inc. v. United States*, 794. F.2d 635 (11th Cir. 1986); *CSX Transp., Inc. v. Atlantic Kraft Corp.*, (S.D.N.Y. 1988). *Seaboard* held that, notwithstanding the historical refusal to consider equitable defenses in cases of railway carrier "misquotations of rates,"

"changed circumstances" warranted re-examination of that policy. Consequently, the Court of Appeals for the Eleventh Circuit upheld the decision of the ICC in refusing to allow a rail carrier to collect undercharges.

Referral to an agency for an advisory opinion is generally appropriate where an issue falls into the primary jurisdiction of the agency. The doctrine of primary jurisdiction is relevant "whenever enforcement of the claim requires the resolution of issues which, under the regulatory scheme, have been placed within the special competence of an administrative body." *United States v. Western Pac. R. Co.*, 352 U.S. 59, 64 (1956).

Referral, however, results in only an advisory opinion which is not binding on the Court. 28 U.S.C. § 1336(b). Thus, whatever resolution is reached by the ICC, the Court will still have to evaluate the claims under the precedential case law and the relevant statutes. Even though the ICC may be within its authority to change its policy, the Court is not bound by its determination.

This Court considered the issue of referring a very similar case to the ICC in *Dela v. Personality Plastics, Inc.*, No. CV-86-2323, slip op. (E.D.N.Y. Oct. 7, 1987). In refusing to refer the matter to the ICC, the Court recognized that it was as able to interpret the statute and determine if Congress intended for there to be some equitable defense to a claim to recover for unpaid tariff charges. The Court found the expertise of the ICC would be an unnecessary aid in deciding whether an equitable defense is appropriate under the law. Judge McLaughlin arrived at essentially the same conclusion in *Delta Traffic v. Coffee Holding Co.*, No. CV-87-2011, slip op. at 3 (E.D.N.Y. 1988). The court reasoned that "[a]bsent change in the substantive law or compelling circumstances presented by a case, the Court is unwilling to depart from well established judicial procedures under which interstate commerce disputes have been addressed for the better part of a century"

Plaintiffs cite other recent cases recognizing the futility of referring this type of case to the ICC. The court in *INF, Ltd. v. Spectro Alloys Corp.*, 651 F. Supp. 1405 (D. Min. 1987), issued a decision referring an undercharge case to the ICC. In a later decision in the same case, *INF, Ltd. v. Spectro Alloys Corp.*, 1988 Fed. Carr. Cas. (CCH) ¶ 83,390 (D. Min. July 8, 1988, the district court noted that referral to the ICC had allowed the record to be more fully developed.

> "Nevertheless, after giving thorough consideration to the ICC's decision, the court determines that it remains bound by the 'filed rate' doctrine established by Congress and the Supreme Court. . . . Neither Congress nor any federal court has seen fit to mitigate the sometimes harsh effects of the filed rate doctrine by allowing equitable defenses. Accordingly, this court must strictly apply the filed rate doctrine and disallow Spectro's equitable defenses, despite the ICC's decision."

Id. (footnotes omitted).

In its second opinion, *Spectro Alloys* rejected its prior reliance on *Seaboard* noting two distinctions. First, *Seaboard* distinguished between consideration of equitable defenses by the ICC and consideration of such defenses by the courts. Second, *Seaboard* did not concern a referral from a court but rather arose from an administrative complaint filed directly with the ICC. Accordingly, the court in *Spectro Alloys* concluded that *Seaboard* does not stand for the proposition that a court may consider an equitable defense to an action seeking collection of undercharges.

This Court would be bound to weigh precedent against any advisory opinion that the agency might issue if the matter were referred to it. Neither the policy decision of ICC *Ex Parte* MC-177 nor *Seaboard* excuses the Court from the obligation to follow Supreme Court and circuit

court precedent. Moreover, recent decisions affirm that the Motor Carrier Act of 1980 did not amend 49 U.S.C. § 10761(a). *See Square D. Co. v. Niagara Frontier Tariff Bureau*, 106 S. Ct. 1922 (1986). Consequently, defendant's motion to stay this action and refer it to the ICC is denied.

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Summary judgment may be granted if there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the burden of demonstrating the absence of any disputed material facts, *Schering Corp. v. Home Insurance Co.*, 712 F.2d 4, 9 (2d Cir. 1983), and the Court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *Beacon Enterprise, Inc. v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983). To defeat a motion for summary judgment, however, the opposing party may not rest upon the conclusory allegations or denials set forth in the pleadings, but must set forth specific facts showing that there is no genuine issue for trial. Rule 56(e); *Schering, supra*, 712 F.2d at 9.

In determining whether there are genuine issues of fact that require a trial, "the evidence of the non-movant . . . is to be believed, and justifiable inferences are to be drawn in [its] favor." *Anderson v. Liberty Lobby*, 106 S. Ct. 2505, 2513 (1986). The defendant does not dispute in its opposing affidavits that the charges originally assessed by the plaintiffs and paid by defendant were not the filed rates. In fact defendant acknowledges that the rates upon which the parties ultimately agreed were negotiated rates. The only factual contention that the defendant asserts in defense of the summary judgment motion concerns plaintiffs' alleged failure to submit the agreed upon negotiated rate to the Commission as the

filed rate. Defendant's affidavits assert that Oneida had represented that it would file tariffs which would reflect the negotiated rates. Thus, it is clear that the defendant was aware that the actual filed rate was not the one which the parties had agreed upon. There is disagreement as to whether plaintiff Oneida agreed to make such changes in the filed rate.

Recognizing the clear applicability of the filed rate doctrine as explained above and the federal courts' continued refusal to rule that equitable defenses may be raised under the relevant law, it is clear that the only area of disputed fact is not material and could not alter the law as applied to the present case. The court of appeals has held that referral of an undercharge claim to the ICC is not applicable where the issue,

> ". . . regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule. Thus, it has been continuously asserted that the courts have original jurisdiction to interpret tariffs, rules and practices where the issue is one of violation, rather that [sic] reasonableness."

Civil Aeronautics Board v. Modern Air Transport, 179 F.2d 622, 624 (2d Cir. 1950). Appco nowhere contends that the tariffs were in anyway confusing or unreasonable. Even construing the factual dispute in the light most favorable to the non-moving party, Appco, the fact that Oneida did not file the new negotiated rates with the Commission, as it represented it would, has no bearing on the law to be applied. Even if Appco's reliance on this representation were considered reasonable, the filed rate doctrine would preclude the assertion of such equitable defenses as fraud and detrimental reliance. *See In Re Carolina Motor Express, Inc.*, 84 B.R. 979 (Bankr. W.D.N.C. 1988). Although the doctrine is admittedly harsh in individual cases, federal court precedent is explicit that equitable defenses are not available to shippers in actions to recover undercharges. Cases are equally

clear that no contract of the carrier could reduce the amount legally payable or release the liability of a shipper who had assumed the obligation to pay the charges. *Louisville and Nashville Company v. Central Iron & Coal*, 265 U.S. 59, 65 (1924); *see also Delta Traffic Service v. Georgia-Pacific Corp.*, No. B-87-482 (D. Conn. June 13, 1988).

There may indeed be valid, even substantial, policy reasons why the law should be modified. Regardless of where the equities actually lie in this case, a modification of the existing law is the province of Congress, not the district court. Since no facts material to the legal issues are in dispute, summary judgment is granted in favor of plaintiffs.

PREJUDGMENT INTEREST

Plaintiffs claim the are entitled to prejudgment interest at the legal rate of interest from the date of the original freight bills. All tariff rates charged must be paid within thirty (30) days. 49 C.F.R. § 1320.2(c), (d). According to the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, a shipper in a reparations action is entitled to prejudgment interest "at a rate equal to the average yield of marketable securities of the United States Government having a duration of 90 days.' 40 U.S.C. § 10707(d)(1). Prejudgment interest is normally awarded in claims for undercharges. *Inman Freight Systems, Inc. v. Olin Corp., supra; Southern Pac. Transp. Co. v. San Antonio*, 748 F.2d 266, 274 (5th Cir. 1984). The court in *Southern Pacific* adopted the 90-day bill as the guiding standard in that collection case as the closest analogy. The court noted that in interpreting that statute the ICC measured prejudgment interest by the Treasury bill rate in effect on "the date the first allegedly unlawful charge is paid." *Revised Procedures to Calculate Interest Rates*, 42 Fed. Reg. 20701 (April 21, 1977). The defendant's motion papers are silent on the subject of prejudgment interest.

The amount of prejudgment interest which the plaintiffs seek was calculated at a rate of 9% per year from the date of delivery of each shipment. The balance due amounts are consistent throughout the time period involved. Therefore, the interest can be ascertained by multiplying the total balance due by 9%. The resulting amount was then multiplied by the number of years since the median date of shipment until January 4, 1988, the day that the claim for prejudgment interest was prepared. The median date of delivery was said to be August 19, 1984. Thus, the equation was as follows: ($19,-32242 x 9%) x 3.378 years = $5,874.41. This is the total amount of interest due plaintiffs.

Plaintiffs also seek prejudgment interest in the amount of $1,280.44 against the defendant, representing a 9% annual rate assessed from January 4, 1987, to the date of judgment, September 29, 1988, at the rate of $4.76 per day, and costs in the amount of $120, which are unopposed.

Accordingly, the Clerk is directed to enter judgment in accordance with this decision in the total amount of $26,597.27 and to mail a copy of the within to all parties.

SO ORDERED.

Dated: Brooklyn, New York

October 31, 1988

Charles Sifton
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 87-2325 (CPS)

DELTA TRAFFIC SERVICE, INC., *et ano*,
Plaintiff,

against

APPCO PAPER & PLASTICS CORP.,
Defendant.

JUDGMENT

[Filed Nov. 7, 1988]

A memorandum and order of Honorable Charles P. Sifton, United States District Judge, having been filed on November 2, 1988, denying defendant's motion to stay the action and refer the case to the Interstate Commerce Commission, granting plaintiff's motion for summary judgment, and directing that judgment be entered in favor of the plaintiff and against the defendant in the total amount of $26,597.27, it is

ORDERED and ADJUDGED that defendant's motion to stay the action and refer the case to the Interstate Commerce Commission is denied; that plaintiff's motion for summary judgment is granted; and that judgment is hereby entered in favor of the plaintiff and against the defendant in the total amount of $26,597.27.

Dated: Brooklyn, New York
November 3, 1988

Clerk of Court

By: James Giokas
JAMES GIOKAS
Chief Deputy Clerk

Supreme Court, U.S.
FILED
OCT 18 1990
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 89-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DELTA TRAFFIC SERVICE, INC.,
and ONEIDA MOTOR FREIGHT, INC.,
Petitioners,

v.

APPCO PAPER & PLASTICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM J. AUGELLO, ESQ.
AUGELLO, PEZOLD &
HIRSCHMANN, P.C.
120 Main Street
Huntington, N.Y. 11743
(516) 427-0100
Attorney for Respondent

Dated: October 18, 1990

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

Question Presented For Review

Did the Court of Appeals correctly determine that the filed rate doctrine does not bar referral of undercharge actions to the Interstate Commerce Commission, where the purpose of referral is to determine reasonableness issues left open by *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, rather than to pursue equitable remedies?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF AUTHORITIES	iii
1. The Circuit Court's Reversal of The District Court's Refusal to Refer the Reasonableness Issue to the ICC was in Accord with *Maislin v. Primary Steel*	1
2. The Court of Appeals' Decision Gives Effect to the Exceptions to the Filed Rate Doctrine	3
3. Shippers Need not Pay Undercharges and Then Seek Reparations From the ICC When Reasonableness is in Issue	6
CONCLUSION	10

TABLE OF AUTHORITIES

Judicial Decisions	Page
Branch Motor Express Co. v. W. R. Grace, No. 86-2408-Z, D. Mass., Sept. 27, 1990	5
Brandon v. Holt, 469 U.S. 464 (1985)	4
Caravan v. Supreme Beef Processors, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990)	6
Delta Traffic Service, Inc. v. Transtop, Inc., No. 89-1662, First Circuit, July 19, 1990	5
Far East Conference v. United States, 342 U.S. 520 (1952)	5
General American Tank Car Corp. v. El Dorado Terminal Co., 308 U.S. 422 (1940)	5
Keogh v. Chicago & Northwestern R.R., 260 U.S. 156 (1922)	3
Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915)	2,3
Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. ___, 110 S.Ct. 2759 (1990)	*passim*
Mohasco Industries, Inc. v. Acme Fast Freight, Inc., 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974)	8
Nader v. Allegheny Airlines, Inc., 426 U.S. 290 (1976)	5
Overland Express, Inc. v. Bay State Milling Company, No. IP90-707C, S.D. Ind., August 22, 1990	5
Southern Pacific Transportation Co. v. City of San Antonio, 748 F.2d 266 (5th Cir. 1984)	6
Texas & Pacific R.R. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907)	5
United States v. Associated Transportation Co., 505 F.2d 366 (D.C. Cir. 1974)	8
United States v. Western Pacific R.R., 352 U.S. 59 (1956)	5,9

Table of Authorities Continued

	Page
Wescar Freight Systems, Inc. v. Freightliner Corp., CA No. 88-6442-MA, D.Ore., July 19, 1990 ...	5
Administrative Decisions	
Glama Dress Co. v. Mid-South Transportation, 335 I.C.C. 586 (1969)	9
N.I.T.L. - *Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986), *clarified*, 5 I.C.C. 2d 623 (1989)	4
Statutes	
49 U.S.C. § 10701(a)	3
49 U.S.C. § 11705(b)(3)	8
49 U.S.C. § 11706(a)	9
49 U.S.C. § 11706(c)(2)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

Case No. 89-1951

DELTA TRAFFIC SERVICE, INC.,
AND ONEIDA MOTOR FREIGHT, INC.,
Petitioners,

v.

APPCO PAPER & PLASTICS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondent, Appco Paper & Plastics Co., by its attorney, replies to the petition of Delta Traffic Service, Inc., and Oneida Motor Freight Co. ("Petitioners") for a writ of certiorari to review the order of the United States Court of Appeals for the Second Circuit in No. 88-9057, dated January 4, 1990, as follows:

1. The Circuit Court's Reversal of The District Court's Refusal to Refer the Reasonableness Issue to the ICC was in Accord with *Maislin v. Primary Steel*

The Second Circuit merely held that the filed rate doctrine does not preclude a District Court's referral to the Interstate Commerce Commission ("ICC") of issues in a motor carrier rate undercharge action that

implicate the "reasonableness" exception to the filed rate doctrine, as set forth in *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94 (1915). Therefore, nothing in the Second Circuit's decision requires review or correction by this Court.

Petitioners misstate the Circuit Court's decision, at page 4 of their petition, as follows:

> "The Court of Appeals below incorrectly found that an equitable defense to an action at law to collect the filed rate could exist by allowing referral to the ICC."

In fact, the Court of Appeals simply restated existing law, as most recently reaffirmed in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. ___, 110 S.Ct. 2759 (1990), when it concluded:

> "Although courts may not mitigate the filed rate by resort to equitable defenses, *Maxwell* recognized an exception to strict enforcement of the filed rate when adverse findings concerning the reasonableness of a disputed rate have been made by the ICC. *See Id.* Since this exception contemplates some action by the ICC, we do not view the filed rate doctrine as a road-block preventing referral of undercharge actions to the ICC. We find that the district court improperly denied Appco's motion for a stay and referral of proceedings to the ICC." 893 F.2d 472, 475.

The Court of Appeals clearly did not apply an equitable defense to this action. It did nothing more than follow this Court's long established adherence,

in cases too numerous to require citation, to the doctrine that administrative agencies have primary jurisdiction to determine issues entrusted to them.

2. The Court of Appeals' Decision Gives Effect to the Exceptions to the Filed Rate Doctrine

On June 21, 1990, this Court reaffirmed "an important caveat" to the filed rate doctrine, holding:

> "... the filed rate is not enforceable if the ICC finds the rate to be unreasonable."

Maislin, supra, 110 S.Ct., at 2767 (citing and explaining *Louisville & Nashville R.R. v. Maxwell,* 237 U.S. 94, 97 (1915), *Keogh v. Chicago & Northwestern R.R.,* 260 U.S. 156, 163 (1922) and 49 U.S.C. § 10701(a)).

Regrettably, Petitioners have omitted this significant exception to the filed rate doctrine in citing *Maxwell* to this Court, at page 7 of their Petition. This omission cannot be characterized as inadvertent, as this incomplete statement of the filed rate doctrine had been brought to Petitioners' counsel's attention on numerous occasions.

In Footnote 10 of *Maislin, supra,* 110 S.Ct., at 2767, this Court acknowledged that the shipper-defendant before it had requested a determination of the reasonableness of the tariff rates, and that

> "[t]he issue of the reasonableness of the tariff rates is open for exploration on remand."

In Footnote 11 of *Maislin, id.,* this Court further reaffirmed the ICC's statutory right to find a carrier's practices to be unreasonable when such a finding requires merely the application of a "different filed tariff" as distinguished from an *unfiled* tariff.

Within the parameters set by Footnotes 10 and 11 of *Maislin*, the Court of Appeals below properly upheld Respondent's position that:

> "... under the circumstances, collection of undercharges would constitute an unreasonable practice, and that the ICC has primary jurisdiction over the issue of the reasonableness of carrier rates and practices." 893 F.2d 472, 473.

The Court concluded as follows:

> "Since we find that Appco was entitled to a determination by the ICC as to the reasonableness of plaintiffs' practices, we reverse and remand for further proceedings." *Id.*

This result was reached in light of Respondent's answer to the Complaint alleging that:

> "... the collection of undercharges based on the rate contained in the filed tariff would constitute an unreasonable practice in light of the negotiated rate." *Id.*[1]

---

[1] Appco's allegation that the collection of the filed rate would constitute an unreasonable practice in light of the negotiated rate was predicated on the law of the case as of August 12, 1987, when its answer was filed. *See N.I.T.L. - Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates*, 3 I.C.C. 2d 99 (1986). On numerous occasions thereafter, the Commission elected not to consider rate reasonableness even when raised by defendants in negotiated rate cases. *See, e.g., Maislin*, 110 S.Ct., at 2767 n.10. In light of this Court's reversal of the Commission's policy in *Maislin, supra*, Respondent will seek leave of the trial court to amend its answer by alleging the unreasonableness of Oneida's rates as well as its practices. Cf. *Brandon v. Holt*, 469 U.S. 464 (1985), wherein this Court upheld the right to amend a complaint to conform to the proof after the law had been changed.

Having raised the issue of reasonableness in its Answer below, Respondent was entitled to be heard on this statutory defense, and the sole forum for such a determination is the ICC. *Texas & Pacific R.R. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-442 (1907); *General American Tank Car Corp. v. El Dorado Terminal Co.*, 308 U.S. 422, 433 (1940); *Far East Conference v. United States*, 342 U.S. 570, 574-575 (1952); *United States v. Western Pacific R.R.*, 352 U.S. 59, 64 (1956); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976).

Maislin, supra, did not foreclose such a determination by the ICC. Post-*Maislin* decisions which have referred reasonableness issues to the ICC include *Delta Traffic Service, Inc. v. Transtop, Inc.*, No. 89-1662, First Circuit, July 19, 1990, affirming Section "A" of a pre-*Maislin* decision in the same case reported at 902 F.2d 101, 104-107 (1990); *Wescar Freight Systems, Inc. v. Freightliner Corp.*, C.A. No. 88-6442-MA, D.Ore., July 19, 1990; *Overland Express, Inc. v. Bay State Milling Company*, No. IP90-707C, S.D. Ind., August 22, 1990; and *Branch Motor Express Co. v. W.R. Grace*, No. 86-2408-Z, D. Mass., Sept. 27, 1990.

The District Court's grant of summary judgment to the Plaintiffs below deprived Respondent of its opportunity to present evidence on the issue of the reasonableness of Oneida's rates and practices. This evidence can and will be presented when the case is remanded by the Second Circuit upon a denial of the instant Writ.

3. Shippers Need not Pay Undercharges and Then Seek Reparations From the ICC When Reasonableness is in Issue

At page 7 of their petition, the Petitioners contend that:

> "... The shipper must pay the tariff rate before it can be challenged as unreasonable. [This] is the sole and exclusive remedy for excessive charges on past motor carrier shipments."

The cases cited in support of this proposition do not warrant such a result herein. Therefore, the Second Circuit did not err in allowing referral to the ICC without requiring Respondent to prepay the amounts at issue.

In particular, *Caravan v. Supreme Beef Processors*, 864 F.2d 388 (5th Cir. 1989), *cert. denied*, 110 S.Ct. 3254 (1990), does not provide sound authority for the proposition that shipper defendants in motor carrier undercharge cases may raise reasonableness defenses only by prepaying the alleged undercharges and later seeking reparations in a separate ICC action. The *Caravan* court's rationale on this point was most revealing:

> "... [O]ur decision [rejecting a shipper's reasonableness defenses and granting summary judgment to a plaintiff seeking undercharges] is governed by our opinion in *Southern Pacific Transportation Co. v. City of San Antonio*, 748 F.2d 266 (5th Cir. 1984). There, we overturned a district court's stay of an execution of judgment by two railroads seeking to collect undercharges for shipments of

coal to a city power plant. The district court had granted the stay pending the Commission's determination of the reasonableness of the railroad's filed rates. We stated,

> 'The Interstate Commerce Act . . . entails a balanced and coherent system for the payment and review of rates. The shipper is required to pay the filed rate at the time of shipment but may later seek review and reparations in the I.C.C. The carrier, on the other hand, receives assurance that payment will not be delayed pending review; but the carrier must be prepared to reimburse amounts later found to be unreasonable.' "

748 F.2d, at 274.

The *Caravan* court's analogy to *San Antonio* does not withstand scrutiny. *San Antonio* involved a protracted and complex railroad rate dispute initiated by a shipper's rate reasonableness complaint before the ICC; at issue was which of several rate levels should be paid by the shipper *pendente lite* when each of these rate levels had been found reasonable by the ICC for ongoing movements at various stages of the ten-year dispute. By contrast, the typical plaintiff in a motor carrier undercharge case is bankrupt; there are no ongoing freight movements for which the ICC already has prescribed rates; and the plaintiff generally is *not* "prepared to reimburse amounts later found to be unreasonable" by the Commission.

Significantly, this Court's decision in *Maislin* did not endorse the *Caravan* Court's "pay now, refer later" theory; Primary Steel was not ordered to pay

the amounts in dispute before pursuing rate reasonableness issues below. To the contrary, the procedure suggested by the Fifth Circuit in *Caravan* violates the holding of this Court in *Maislin*, at Footnotes 10 and 11, which recognized and preserved the shipper's statutory right to determination by the ICC of reasonableness issues.

Equally inapposite is Petitioners' citation to *Mohasco Industries, Inc. v. Acme Fast Freight, Inc.*, 491 F.2d 1082 (5th Cir.), *cert. denied*, 419 U.S. 842 (1974), and *United States v. Associated Transportation Co.*, 505 F.2d 366 (D.C. Cir. 1974). Both of these decisions involved attempts by shippers to bring common-law actions for restitution of freight charges they already had paid under filed rates that the ICC subsequently had found unreasonably high. In both cases, the respective Appeals Courts merely remitted shipper plaintiffs to their statutory reparations remedy. Thus *Mohasco* and *Associated*, like *San Antonio, supra*, are inapposite where, as here, a shipper initially raises its unreasonableness claims as a defense to a carrier's undercharge suit.

The objective of Petitioners, in suggesting that Respondent pay the alleged undercharges to Petitioners and then seek reparations in a proceeding before the ICC, is all too obvious. Petitioners are attempting to maneuver Respondent into the position of a post-bankruptcy unsecured creditor with no recourse even if the ICC were to determine that the rates herein are unlawful. The statutory remedy of reparations envisioned by 49 U.S.C. § 11705(b)(3) would be frustrated if a shipper were to be required to pay first and seek relief later, when the carrier is in bankruptcy.

An analogous situation was presented to the ICC in *Glama Dress Co. v. Mid-South Transports*, 335 I.C.C. 586 (1969). In *Glama*, it was claimed that the two-year statute of limitations for filing a reparations complaint at the I.C.C. barred the shipper from seeking reparations in defense to an action for additional freight charges brought within three years under 49 U.S.C. § 11706(a). The ICC held, at 589:

> "Under [the motor carrier's] interpretation of the involved statutory provisions a shipper who has paid what it considers the proper rate or charge would be foreclosed from a possible meritorious defense to a court action anytime the carrier sues for undercharges after the 2-year period specified in section [11706(c)(2) for reparations actions by shippers] has expired. We recognize that the Commission has no jurisdiction to award damages for unreasonable or discriminatory rates under part II of the act. The Supreme Court, however, in dealing with the statute-of-limitation provisions in section 16 of part I of the act, stated in *United States v. Western Pac. R. Co.*, 352 U.S. 59, at page 72 that: '[o]nly the clearest congressional language could force us to a result which would allow a carrier to recover unreasonable charges with impunity merely by waiting two years before filing suit.' "

Requiring Respondent to pay the additional charges sought herein to Oneida's Trustee would produce the very result proscribed by this Court in the *Western Pacific* decision quoted, and followed, by the ICC in *Glama*.

Conclusion

The Second Circuit properly has concluded that Respondent has a right to be heard on its defenses to this action for undercharges based on Oneida's filed tariff rates. The District Court below improperly deprived Respondent of this opportunity by granting Petitioners' motion for summary judgment, without an opportunity for discovery. The Appeals Court's decision is not in conflict with this Court's recent decision in *Maislin*, which recognizes and reaffirms the right of shippers to a determination by the ICC of the reasonableness of carriers' rates and tariff-related practices.

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

WILLIAM J. AUGELLO, ESQ.
AUGELLO, PEZOLD &
HIRSCHMANN, P.C.
120 Main Street
Huntington, N.Y. 11743
(516) 427-0100

Attorney for Respondent

Dated: October 18, 1990